

ADVERTISING & MARKETING

USA



Advertising & Marketing

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Quick reference guide enabling side-by-side comparison of local insights, including into the legal and regulatory framework; private enforcement (litigation and administrative procedures); misleading advertising; prohibited and controlled advertising; social media advertising; and recent trends.

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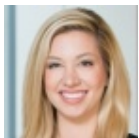
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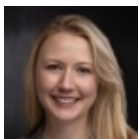
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LEGISLATION AND REGULATION

Legal framework

What are the principal statutes regulating advertising generally?

Federal and state statutes regulate advertising in the United States.

Federal

At the federal level, several statutes regulate advertising, including the following:

- the Federal Trade Commission Act prohibits 'unfair methods of competition', 'unfair or deceptive acts', and false advertisements (15 USC sections 41–58);
- the Lanham Act prohibits false or misleading advertisements, such as those likely to cause deception or confusion between competitor products (15 USC section 1064);
- the Federal Food, Drug, and Cosmetic Act prohibits false or misleading food, drug, medical device and cosmetic advertisements (21 USC sections 301–392); and
- other context-specific statutes, such as the Truth in Lending Act (TILA), the Federal Alcohol Administration Act, the Federal Aviation Act, the Federal Cigarette Labeling and Advertising Act, and the Federal Insecticide, Fungicide and Rodenticide Act.

State

States regulate advertising through generally applicable consumer protection statutes. Many states have adopted the Uniform Deceptive Trade Practices Act, which prohibits unfair or deceptive practices, such as misleading advertising. Some commonly litigated state consumer protection statutes include the following:

- California's Unfair Competition Law (California Business and Professions Code sections 17200–17210), False Advertising Law (California Business and Professions Code section 17500), and Consumer Legal Remedies Act (California Civil Code sections 1750–1785);
- New York's General Business Law (GBL sections 349, 350);
- Illinois' Consumer Fraud and Deceptive Business Practices Act (815 ILCS 505/1 et seq); and
- Missouri's Merchandising Practices Act (VAMS 407.020).

Law stated - 23 January 2023

Regulators

Which bodies are primarily responsible for issuing advertising regulations and enforcing rules on advertising? How is the issue of concurrent jurisdiction among regulators with responsibility for advertising handled?

Federal

The Federal Trade Commission (FTC) retains primary jurisdiction for issuing and enforcing advertising laws and regulations. Even so, multiple federal agencies share concurrent jurisdiction to enforce such laws.

For example, the FTC has concurrent jurisdiction with the Food and Drug Administration over food, drug, medical

device, and cosmetic advertising. However, the FTC and Food and Drug Administration have executed a Memorandum of Understanding allocating enforcement responsibility between them. Under this Memorandum, the FTC retains primary jurisdiction over the regulation of all advertising (other than labelling) of food, non-prescription drugs, medical devices and cosmetics and the Food and Drug Administration retains primary jurisdiction over the truth or falsity of prescription drug advertising.

Several other federal agencies share responsibility with the FTC to issue and enforce federal advertising laws, such as:

- the Federal Communications Commission, which regulates some aspects of broadcast media advertising;
- the Alcohol Tobacco Tax and Trade Bureau, which regulates alcohol advertising;
- the Consumer Financial Protection Bureau, which regulates some financial company advertising;
- the Securities and Exchange Commission, which regulates investment advisers' advertising practices, such as the inclusion of performance results in materials; and
- the Department of Transportation, which regulates airline advertising.

State

State attorneys general typically have the power to enforce consumer protection statutes of a specific state and thus also regulate advertising. Some states, similar to the federal government, have departments dedicated to consumer protection issues and in many states, consumers can seek redress for unfair advertising law violations through civil lawsuits. The states sometimes work together to bring enforcement against advertisers believed to be engaging in illegal conduct.

Law stated - 23 January 2023

Regulators' powers

What powers do the regulators have?

Regulators have a range of options to enforce advertising laws, including enforcement actions and civil lawsuits. For example, if an advertisement does not comply with the law, the FTC can:

- issue cease and desist orders in connection with administrative proceedings;
- seek refunds to consumers or disgorgement of profits following administrative proceedings in certain circumstances;
- seek an injunction in federal court to prohibit the advertisement from continuing to run, to order corrective advertising or disclosure, in addition to other informational remedies; and
- impose fines of up to US\$50,120 per violation for violation of an existing cease and desist order or certain FTC rule violations.

The FTC can enforce its laws independently and it can act on complaints from consumers or competitors.

State consumer protection statutes also carry significant penalties. For example, New York's General Business Law imposes a US\$5,000 civil penalty per violation. The law also permits the Attorney General to sue to enjoin unlawful advertisements and seek restitution.

Law stated - 23 January 2023

Regulators' priorities

What are the current major concerns of regulators?

The FTC's current major concerns include:

- endorsement and influencer marketing and reviews;
- made in USA claims;
- environmental marketing claims;
- junk fees;
- dark patterns online;
- privacy and data security;
- for-profit education and online money-making schemes; and
- the impact of deceptive or unfair practices in the use of emerging technologies, such as algorithmic bias.

Law stated - 23 January 2023

Industry codes

Give brief details of any issued industry codes of practice. What are the consequences for non-compliance?

Many industries have agreed to self-regulate their advertisements. One of the most prolific examples of such a self-regulating system in the United States is the National Advertising Division (NAD), a national programme administered by the national Better Business Bureau. The NAD does not have its own advertising code, but monitors advertising for truth and accuracy to encourage compliance, build consumer trust and support market competition. Consumers and competitors can also submit challenges to advertisements to the NAD, which resolves these disputes. Through these cases, the NAD has developed and published a body of precedent to provide advertisers with guidance for assessing whether their claims are truthful, non-misleading and sufficiently substantiated. If advertisers choose not to participate in a NAD proceeding or comply with a NAD decision, the NAD will refer the advertiser to the FTC for possible law enforcement. NAD decisions are not binding and the NAD has no authority to mandate compliance; nevertheless, it often reports that over 95 per cent of advertisers subject to the process will voluntarily comply with NAD decisions and recommendations.

The Better Business Bureau also has a Children's Advertising Review Unit. This monitors advertising directed to children to ensure that it is truthful and compliant with the unit's self-regulatory guidelines. It also reviews online marketing for compliance with its guidelines and the Children's Online Privacy Protection Act .

Some industries have their own voluntary advertising codes or self-regulatory bodies.

- Alcohol: the Distilled Spirits Council has promulgated standards for spirits products, and the Beer Institute and Wine Institute have adopted similar codes for their respective products. Unlike the NAD, the Distilled Spirits Council does not refer non-compliant advertisers to the FTC or another regulatory body.
- Children's Food and Beverage Advertising Initiative: participants in this initiative agree to only advertise products to children under 12 that meet the initiative's Uniform Nutrition Criteria and do not advertise in elementary schools.
- Direct Selling Self-Regulatory Council: this council monitors claims and income representations by direct selling companies to ensure accuracy and substantiation. Competitors, consumers and non-governmental organisations can submit claims. The council prioritises content that shows a pattern or practice of non-compliance.

Authorisation**Must advertisers register or obtain a licence?**

In general, regulators in the United States do not require advertisers to register or obtain a licence. Advertisers engaging in charitable co-ventures may be required to register in certain states.

Law stated - 23 January 2023

Clearance**May advertisers seek advisory opinions from the regulator? Must certain advertising receive clearance before publication or broadcast?**

Businesses and industry groups may solicit advisory opinions from the FTC regarding proposed conduct (16 CFR sections 1.1–1.4). The request and opinion will be placed on the public record. Commission staff will provide most advisory opinions. The Commission itself will typically only issue an advisory opinion if the request involves a novel issue of law or raises a matter of significant public interest.

The FTC does not require or provide clearance of advertisements before publication or broadcast but it does provide several guidance documents to help businesses with compliance. For example, the FTC has compiled advertising compliance guides for the alcohol, appliance, automobile, clothing and textile, and jewellery industries. It has also put together claim-specific guides, such as the Green Guides, which assist companies that make environmental marketing claims.

The Food and Drug Administration pre-clears advertising for drugs and certain medical devices. Pre-clearance is not required for food and beverage advertising. Alcoholic beverages subject to regulation by TTB are required to submit labelling for pre-approval.

Law stated - 23 January 2023

PRIVATE ENFORCEMENT (LITIGATION AND ADMINISTRATIVE PROCEDURES)**Challenging competitors' advertising****What avenues are available for competitors to challenge advertising? What are the advantages and disadvantages of the different avenues for challenging competitors' advertising?**

Two common avenues that businesses utilise to challenge competitors' advertising are federal Lanham Act cases and National Advertising Division (NAD) challenges. Section 43 of the Lanham Act provides a pathway to bring actions against competitors for both false or misleading statements as well as misrepresentations related to 'the nature, characteristics, qualities, or geographic origin' of products or services in commercial advertising (see 15 USC section 1125(a)(1)).

The NAD is one of the advertising industry's self-regulatory bodies, which provides a voluntary dispute resolution process for competitors. NAD provides three procedural 'tracks' for businesses to challenge competitors' advertising. Advertisers may utilise other regulatory forums, such as other Better Business Bureau National Programs (ie, Children's Advertising Review Unit or ERSF) or by submitting a complaint through the Federal Trade Commission (FTC).

The NAD process is considered significantly more cost-effective and time-efficient for the challenger, and often

involves less risk in the outcome given the NAD's specialised knowledge of advertising. However, litigation provides the challenger with the opportunity to seek monetary damages or a temporary restraining order as remedies.

Law stated - 23 January 2023

Public challenges

How may members of the public or consumer associations challenge advertising? Who has standing to bring a civil action or start a regulatory proceeding? On what grounds?

Members of the public may bring private consumer actions for false advertising, generally as class actions, under various state consumer protection laws. In most states, consumers have standing under these statutes and may bring claims for being misled by the business's alleged false advertising practices. See, for example, California Unfair Competition Law, California Business and Professions Code sections 17200–09; California Consumers Legal Remedies Act, California Civil Code sections 1750–84; and NY General Business Law section 350. Some states provide for overlapping consumer enforcement within a state of food and drug laws typically administered by the Food and Drug Administration.

Additionally, public challenges may occur, via consumer complaint or otherwise, through state attorneys general and FTC investigations. The NAD has its own self-monitoring authority that may bring public challenges. Consumer associations can bring NAD challenges, and in theory an individual could bring an NAD action too.

Law stated - 23 January 2023

Burden of proof

Which party bears the burden of proof?

In federal Lanham Act and consumer class action litigation, the plaintiff bears the burden of proof as the movant. The burden of proof at trial is a preponderance of the evidence. (Under the Lanham Act, a court may presume that false advertisement causes harm to the plaintiff.) In NAD challenges, the advertiser has the burden to demonstrate a reasonable basis for all challenged express and implied claims. Once the advertiser establishes a reasonable basis, the challenger must show either better evidence disproving the reasonable basis or that the advertiser's substantiation was fatally flawed.

Law stated - 23 January 2023

Remedies

What remedies may the courts or other adjudicators grant?

Federal Lanham Act cases are often resolved with a preliminary injunction. Plaintiffs generally move for preliminary injunctions or temporary restraining orders (TROs) prohibiting the use of the challenged advertising materials. TROs offer short-term relief but are rarely granted, which leads plaintiffs to seek preliminary injunctions, which offer a temporary remedy pending a full trial. Due to the cost of litigation, the defendant may seek to withdraw and alter the challenged advertising rather than continue with litigation. Additionally, plaintiffs can recover damages for lost profits, the defendants' profits attributable to the false advertising, and corrective advertising expenses. However, damages can be quite difficult to measure and will require expert testimony. The plaintiff must establish either actual consumer deception via a consumer survey or that the defendant was intentionally deceptive to recover monetary damages. For purposes of injunction relief, a court may presume that the plaintiff has been harmed upon the plaintiffs' showing that

the advertisement is false. Under sections 35 and 36 of the Lanham Act, the court may treble the damages and award attorney's fees.

The NAD has little enforcement authority. If the NAD finds claims to be unsubstantiated, it will recommend that the advertiser modify or discontinue the claim. If a party does not adhere to the NAD's recommendation, the case will be recommended to the FTC for review. The NAD does not have authority to issue damages, an injunction, or other remedies.

Law stated - 23 January 2023

Length of proceedings

How long do proceedings normally take from start to conclusion?

Federal Lanham Act litigation rarely proceeds to a final trial, but a case may easily take a full year or two to reach a final trial date. Time to trial varies among the federal district courts. The parties may consent to merge the trial and preliminary hearing, which can shorten the overall litigation length. Damages and liability may be bifurcated, and once the judge or jury has made an initial decision regarding liability, a settlement to determine fair damages may save money by shortening the litigation. Additionally, appeals may extend the length of litigation.

NAD challenges proceed more quickly than litigation. The 'Standard Track' timeline for a NAD challenge is usually between four and six months, but may extend longer. The NAD has a 'Fast-Track SWIFT' option for limited types of claims that allows for a decision to be made within 20 business days of submission. The final option, 'Complex Track', allows for the parties to determine the time that will be required to address more complex substantiation issues. Regardless of the chosen track, an NAD challenge should take less time than federal litigation.

Law stated - 23 January 2023

Cost of proceedings

How much do such proceedings typically cost? Are costs and legal fees recoverable?

The cost of an NAD challenge will almost always be significantly less expensive than federal Lanham Act litigation. An NAD challenge does not allow for discovery or counterclaims, narrows the focus of the challenger's claims, limits the number of briefings by the parties and does not generally require experts or surveys. There is great variability of costs in these cases, but they may range from the tens of thousands of dollars to the low six figures, depending on complexity. No costs or legal fees are recoverable related to NAD challenges. Similar to NAD challenges, federal Lanham Act litigation costs can vary greatly depending on the complexity. These cases are likely to range in the millions of dollars because of attorney fees associated with discovery, counterclaims and other components of complex litigation as well as expert fees associated with claim substantiation, consumer survey determination and damages determination. The prevailing party may recover attorney's fees if the deception was proven to be knowing and wilful and under the discretion of the judge.

Law stated - 23 January 2023

Appeals

What appeals are available from the decision of a court or other adjudicating body?

Decisions of a trial court in federal Lanham Act litigation are appealable as of right to an appellate court to address errors of law, but generally not errors of facts found by the trial court. NAD decisions can be appealed by the

advertisers by right, whereas the challenger must seek permission to appeal. If the advertiser does choose to appeal, the challenger has the right to cross-appeal issues not appealed by the advertiser. These issues are appealed to the National Advertising Review Board (NARB). The NARB employs non-lawyer advertising experts to review the ruling of the NAD attorneys. In consumer class actions, the right of appeal may vary by stage of the case. Generally speaking, all final jury decisions are appealable, but the appealability of various trial court rulings may vary.

Law stated - 23 January 2023

MISLEADING ADVERTISING

Editorial and advertising

How is editorial content differentiated from advertising?

Editorial content is intended to inform, educate or entertain. Unlike advertising, editorial content is not intended to sell a product. In recent years, the lines between editorial content and advertising have blurred, resulting in the rise of 'native advertising' or 'sponsored content', which often looks like editorial content but is paid for or influenced by an advertiser. It is best practice to treat sponsored content as if it were a traditional advertisement through the use of clear labelling and disclosures.

Under Federal Trade Commission (FTC) guidance, sponsored content should be clearly delineated from editorial content. Clear, prominent, and frequent labelling that content is paid for or influenced by an advertiser should be present on each piece of sponsored content, including on social media platforms and on every page of a website, so that consumers can quickly identify the content as an advertisement and not unvarnished opinion. Clear and conspicuous disclosures, placed in close proximity to the sponsored content, are also required and may include:

- an advertisement or 'ad';
- sponsored content;
- brought to you by __; and
- promoted by __.

Law stated - 23 January 2023

Advertising that requires substantiation

How does your law distinguish between 'puffery' and advertising claims that require support?

In the United States, 'puffery' is generally viewed as exaggerated statements or empty superlatives that no reasonable consumer would rely upon. For example, 'the best coffee ever' functions as puffery because the statement is so subjective that no consumer expects it to be truthful. By contrast, advertising claims are routinely relied upon by consumers to assist with purchasing decisions and therefore require sufficient evidence showing that the advertiser has a reasonable basis to make its claim before the claim is made.

Courts typically evaluate whether an advertiser's claim is puffery or advertising by considering whether a claim is:

- general or specific;
- capable of measurement;
- couched in terms of fact or opinion; and
- is likely to be relied upon by consumers.

While the line between puffery and advertising claims is often thin, advertisers may look to these factors to help assess their claims and minimise potential liability.

Law stated - 23 January 2023

Rules on misleading advertising

What are the general rules regarding misleading advertising? Must all material information be disclosed? Are disclaimers and footnotes permissible?

As a general rule, advertisements must be truthful and non-deceptive, fair and have evidence to support their claims ('substantiation'). An advertisement can be viewed as misleading if it fails to disclose material, relevant information or suggests something about a product that is not true. Information is considered 'material' if a consumer would rely on it when deciding whether or not to make a purchase.

Disclaimers and disclosures are permissible, and can be helpful to provide additional information or limit or clarify an advertiser's claim. All disclaimers and disclosures must be clear and conspicuous to allow consumers to be able to notice, read or hear, and easily comprehend the information provided. Best practice dictates that disclaimers be in close proximity to their related claims, prominently placed, understandable to the average consumer and not cluttered by additional distracting elements. For longer advertisements, disclaimers should be repeated. Disclaimers cannot contradict the main claims of an advertisement, and false or deceptive advertising claims cannot be cured with the use of a disclaimer.

Law stated - 23 January 2023

Substantiating advertising claims

Must an advertiser have proof of the claims it makes in advertising before publishing? Are there recognised standards for the type of proof necessary to substantiate claims?

Under federal and some state laws, an advertiser must have evidence that provides a 'reasonable basis' for each of its advertisement's material claims ('substantiation') before publication. This is known as the prior substantiation doctrine and failure to have such evidence in hand can constitute a violation of the Federal Trade Commission Act (FTC Act). The amount of substantiation required for a claim varies, but advertisers must have, at minimum, the amount and type of evidence that an advertisement claims (or suggests) to consumers. Thus, an advertisement that expressly claims 'studies show four out of five dentists prefer XYZ toothpaste' requires that the advertiser have a reliable study supporting this statement. Likewise, an advertisement that implies that four out of five dentists prefer XYZ toothpaste must have the level of substantiation suggested by the advertisement. Implied claims are determined by whether a 'significant minority' of consumers infer the claim, and may be drawn from images, charts and written or verbal statements.

When an advertisement's claim does not overtly identify a necessary level of supporting evidence, a reasonable-basis standard is applied. The reasonable-basis standard weighs the following factors: type of claim, product, consequences of a false claim, benefits of a truthful claim, cost of developing substantiation for the claim, and degree of substantiation that experts in the field believe is reasonable. Expert testimony or consumer surveys are helpful to further inform this analysis. In cases where advertisers' claims relate to health or safety, the reasonable basis standard is higher. Health and safety claims must be supported by 'competent and reliable scientific evidence', such as tests, studies, research or analyses conducted in a manner generally accepted by the relevant scientific community. To the extent possible, all substantiation tests must also replicate real-world conditions and situations.

Law stated - 23 January 2023

Survey results

Are there specific requirements for advertising claims based on the results of surveys?

Advertisers must have the level of evidence that an advertisement claims it has to comport with requirements of the prior substantiation doctrine. A reliable survey is therefore required to substantiate claims based on survey results. For example, if an advertisement states that two out of three dentists recommend XYZ toothpaste, the advertiser should have a reliable survey, conducted using methods that experts in the field accept as accurate, to support these claims.

The survey must be reliably conducted, with unbiased administration and sufficient numbers of randomised respondents, in relevant geographic markets. There are numerous published court and National Advertising Division (NAD) decisions addressing the requirements of good surveys.

Law stated - 23 January 2023

Comparisons with competitors

What are the rules for comparisons with competitors? Is it permissible to identify a competitor by name?

Truthful and non-deceptive comparative advertising is generally encouraged. Comparative advertising typically identifies two or more distinct brands by name, picture or another distinctive characteristic and evaluates the brands' objective features, such as ingredients, style or price, against each other. When properly executed, comparative advertising is a helpful means to provide important information to consumers, assist in thoughtful and informed purchases, encourage innovation, and even decrease prices in the marketplace.

A key consideration for a comparative advertiser is whether the advertising is honestly informing consumers of the advantages of its products as opposed to those of a competitor. Failure to advertise in an honest and non-deceptive manner may trigger liability for false advertisement or product disparagement. As with all other advertising claims, comparative advertisers should also have sufficient evidence to substantiate their claims. For example, if an advertiser claims its product is superior to a competitor's product, then it must have proof to support that claim, preferably in the form of head-to-head testing.

It is generally accepted that advertisers may compare unlike products ('apples to oranges' comparisons) so long as material differences in the products are disclosed in the advertisement.

Law stated - 23 January 2023

Test and study results

Do claims suggesting tests and studies prove a product's superiority require higher or special degrees or types of proof?

An establishment claim suggests to consumers that a product's superiority has been scientifically established, and therefore requires the specific substantiation claimed by the advertiser. For example, if an advertiser claims its product has been 'medically proven' to work, then the advertiser must have substantiation that will sufficiently satisfy the relevant medical community that the claim is true. Such substantiation may be provided via tests, analyses or other studies.

In court under the Lanham Act, a plaintiff may prevail by showing that the advertiser's tests or studies, cited in the ad, are flawed. This is an exception to the normal burden of proof on the plaintiff to come forward with independent

evidence that the challenged claim is false.

Law stated - 23 January 2023

Demonstrating performance

Are there special rules for advertising depicting or demonstrating product performance?

Generally, an advertiser may demonstrate the product's performance in an advertisement but will need to be able to substantiate that the performance depicted reflects the typical, or real-world, performance a customer would expect. A demonstration should be real, typical, follow product use instructions and accurately show a product's features without special effects. Advertisers should consider implied product claims that are communicated during a product demonstration. If the performance is a dramatisation, the dramatisation should be disclosed and should still accurately reflect typical product performance. Advertisers should not use extreme or unrealistic conditions, known as a torture test, to demonstrate a product's performance, especially with comparative advertisements (such as pouring wine through a water filter). Televisions networks may require a 'producer's affidavit' attesting to the fact that a video of a demonstration reflects what actually took place and that there were no hidden means of altering performance.

Law stated - 23 January 2023

Third-party endorsements

Are there special rules for endorsements or testimonials by third parties, including statements of opinions, belief or experience?

Yes, the FTC's Guides Concerning the Use of Endorsements and Testimonials in Advertising are intended to help advertisers ensure that their endorsements are truthful and not misleading. The Guide includes information regarding endorsements from consumers, celebrities, experts and organisations. Any type of third-party endorser who received anything of value to promote or review a product should disclose that they were paid. Endorsers should not talk about their experience with a product if they have not tried the product or make claims that they are unable to prove or would not reflect the results of a typical user. Further, any connection between the endorsers and advertiser that would affect how people understand the endorsement should be disclosed. This guidance also applies to 'influencer' endorsements on social media platforms, such as Instagram or TikTok, where the influencer must disclose their content is an advertisement (see 16 CFR pt 255). In May 2022, the FTC requested public comment on proposed updates to these Guides, the first update since 2009. These updates reflect cultural and technological changes to advertising, especially as related to social media and child-directed endorsements.

Law stated - 23 January 2023

Guarantees

Are there special rules for advertising guarantees?

Yes, the FTC's Guides for the Advertising of Warranties and Guarantees are designed to help inform advertisers of the necessary requirements for warranties or guarantees included in the advertisement. A guarantee, such as 'satisfaction guaranteed', 'lifetime guarantee' or 'money-back guaranteed', is considered an additional factual claim that must be substantiated. The advertiser must have sufficient evidence to support its claim that the product will perform as described, because it is insufficient that the advertiser will simply issue a refund if the product does not meet the guarantee. Guarantees are understood to be unconditional unless the terms are clearly communicated, such as requirements for returns or proof of purchase. Warranties on products costing more than US\$15 must be available prior

to purchase (see 16 CFR pt 239; see also FTC Pre-Sale Availability Rule, 16 CFR section 702).

Law stated - 23 January 2023

Environmental impact

Are there special rules for claims about a product's impact on the environment?

Yes, the FTC's Guides for the Use of Environmental Marketing Claims, known as the 'Green Guides', are designed to help advertisers avoid making environmental claims that may mislead consumers. The Green Guides discourage misrepresentation or overstatement of environmental claims and unqualified general environmental benefit claims. The guidance recommends that advertisers avoid broad, vague or unsupported claims, avoid omitting pertinent information and ensure claims are supported with reliable evidence. The FTC has issued warning letters and brought claims against deceptive environmental advertisements, most commonly regarding environmental buzzwords such as 'biodegradable', 'recyclable', 'compostable' and 'renewable'. The Green Guides were last updated in 2012 and the FTC announced it was seeking public comment on potential updates or edits to the Green Guides on 14 December 2022. Comments are due in mid-February, unless numerous requests for extension of the comment period are granted, and the FTC will likely provide proposed updates to the Green Guides within the next two years, possibly including a rulemaking.

Law stated - 23 January 2023

Free and special price claims

Are there special rules for describing something as free or a free trial or for special price or savings claims?

Yes, the FTC's Guide Concerning Use of the Word 'Free' and Similar Representations provides guidance on how to properly set forth promotional devices related to free products. A 'free' advertisement generally suggests a special offer in which the customer pays nothing for the additional free article and pays nothing further for the original article. All conditions and obligations must be clearly and conspicuously disclosed to the consumer. Businesses that offer frequent sales may also be at risk for a fictitious pricing claim alleging that a non-sale, or regular price, does not exist (see 16 CFR pt 251). In recent years, the FTC has pursued various cases related to online marketers offering 'free trials' that contained automatic renewals, known as negative option billing. The FTC's negative option marketing policy requires a business to provide clear and conspicuous disclosures, obtain express informed consent to enrolment in the negative option, a simple mechanism for cancelling the service and receipt of confirmed authorisation (FTC Act, 15 USC 45(a); ROSCA, 15 USC 8401-05; Telemarketing Sales Rule, 16 CFR pt 425; EFTA, 15 USC 1693). Many states have automatic renewal laws that impose additional requirements, including written confirmation of the material terms and conditions and reminders that plans will automatically renew.

Law stated - 23 January 2023

New and improved

Are there special rules for claiming a product is new or improved?

Yes, a few general rules do apply to the use of the word 'new' and advertising products as 'improved'. The NAD applies a general rule that 'new' claims should only be made for a period of six months after national roll-out for a product not previously on the market. The use of 'new' may also depend on the type of product. Textiles should not be advertised as new if they have been reclaimed or respun and tyres should not be advertised as new when describing retreads.

Advertisers should be aware of the risks in using 'new' for repurposed products. Advertisers may wish to claim a product is 'new and improved', a superiority claim over a prior version of a similar product. Advertisers should ensure that the product change is an actual improvement by ensuring the improvement is consumer-relevant with testing to show the alteration makes a difference for consumers in a relevant way.

Law stated - 23 January 2023

Claims of origin

Are there special rules for claiming where a product is made (such as country of origin)?

Yes, there are special rules for claims based on a product's country of origin. One of the most prominent rules is for products claiming 'Made in the USA', which the FTC discusses in its Enforcement Policy Statement on U.S. Origin Claims . The FTC requires products advertised with a 'Made in the USA' claim to be all or virtually all made in the United States, which ordinarily requires that all significant parts and processing that go into the product are of US origin. The advertiser should consider the site of final assembly and processing, the proportion of US manufacturing costs, and the remoteness of any foreign content. Additionally, other disclosures about the country of origin may be required for specific products. For example, textile products are required to disclose the country of origin for the product under the Textile and Wool Act .

Law stated - 23 January 2023

PROHIBITED AND CONTROLLED ADVERTISING

Prohibited products and services

What products and services may not be advertised?

Illegal products and services may not be advertised. There are additional restrictions or disclosure requirements for advertising certain legal products. For example, alcohol advertising cannot be targeted to anyone under 21 (the legal drinking age in the United States) and tobacco products cannot be advertised on television and many social media platforms. Many other restrictions on tobacco ads also apply. Broadcasters, publishers and media platforms have their own advertising policies and standards that identify specific products and services that may not be advertised.

Law stated - 23 January 2023

Prohibited advertising methods

Are certain advertising methods prohibited?

Deceptive advertising is prohibited. In its Advertising FAQ's: A Guide for Small Business the Federal Trade Commission (FTC) has stated 'it would be deceptive for marketers to embed ads with subliminal messages that could affect consumer behavior. However, most consumer behavior experts have concluded that such methods aren't effective'. Although subliminal advertising is considered ineffective, it would be prohibited as deceptive.

Unsolicited commercial electronic messages (including SMS) are prohibited under the Telephone Consumer Protection Act (TCPA). Further, the CAN-SPAM Act imposes certain restrictions on unsolicited email messages.

The TCPA requires express written consent that the consumer opts in to the SMS marketing campaign. The TCPA requires a business to provide certain information to the consumer in the text:

- a description of the campaign;

- the approximate number of messages the consumer will receive (such as once per day or twice a month);
- instructions on how to opt out from the campaign;
- instructions on how to get help information; and
- where to find the full terms and conditions of the business's privacy policy.

The CAN-SPAM Act regulates all commercial emails, defined as 'any electronic mail message the primary purpose of which is the commercial advertisement or promotion of a commercial product or service', and includes email that promotes content on commercial websites. It restricts businesses from using false information to open multiple email accounts, transmitting unsolicited commercial emails through open relays, falsifying header information, using deceptive subject lines and harvesting email addresses. Additionally, a business must provide the following information in the commercial email:

- accurate header information and subject lines;
- notice of the right to opt out;
- a functional opt-out procedure;
- the business's physical address;
- notice that the message is an advertisement; and
- warning labels for sexually explicit content.

Opt-out requests made by consumers must be honoured.

Law stated - 23 January 2023

Protection of minors

What are the rules for advertising as regards minors and their protection?

The FTC works with consumer advocates, academics and the industry to create effective self-regulatory initiatives regarding advertising to minors, although those guidelines are not binding as law. In particular, the Children's Advertising Review Unit of BBB National Programs established voluntary guidelines for advertising to children that were revised to go into effect on 1 January 2022. The guidelines suggest that advertisers not exploit children's credulity nor advertise inappropriate products or content. Advertisers should consider any lesson affecting health or wellbeing that is being conveyed in the advertising, and should 'contribute to the parent-child relationship in a constructive manner' and 'support positive and beneficial social behavior'. The advertising should not portray or encourage negative social stereotyping, prejudice or discrimination. Hosts of children's programmes may not advertise products, and additional disclosures may be required for advertising directed at minors. Adult product advertising should not be directed at minors.

The Children's Online Privacy Protection Act (COPPA) is enforced by the FTC and regulates the collection of personal information from children under 13. COPPA requires businesses to include certain information in their privacy policies and to obtain parental consent before collecting information from children online.

Law stated - 23 January 2023

Credit and financial products

Are there special rules for advertising credit or financial products?

In addition to general compliance requirements, such as section 5(a) of the Federal Trade Commission Act, which prohibits unfair or deceptive acts or practices (UDAP), and a tapestry of state laws, credit and financial product advertisements are subject to a number of specific federal regulations.

One example, and perhaps the most well known, is 12 C.F.R. 1026 – Truth in Lending (Regulation Z). Regulation Z requires that both open- and closed-end credit products must make advertised terms actually available (see 12 C.F.R. §1026.16(a) and all required disclosures must be clear and conspicuous 12 C.F.R. §1026.24(a) . In other words, if an advertisement mentions specific credit terms, the creditor must provide those terms to applicants. The clear and conspicuous standard does not require a specific format, but it does require the disclosures to be in a 'reasonably understandable form' so as not to make it difficult for consumers to understand the credit terms (see Comment for 1026.17 General Disclosure Requirements). Regulation Z also imposes a variety of advertising requirements that are specific to open-end credit products or closed-end credit products. Some of these requirements are listed in 12 C.F.R. 1026. The National Credit Union Administration provides a Truth in Lending Act Checklist that can serve as a helpful guide.

The Truth in Savings Advertising Rules (Regulation DD), at its simplest, prohibits advertisements from being inaccurate, misleading or misrepresenting an institution's deposit contract. Regulation DD includes one trigger term: the statement of a rate of return. That is, if a rate of return is stated, it must be the 'annual percentage yield' for the advertised accounts. Regulation DD also include special rules for broadcast or electronic media, outdoor media or telephone response machines.

In addition to the federal regulations listed above, credit and financial products can also be subject to advertising guidance from not-for-profit groups such as FINRA and independent agencies like the FDIC. FINRA (the Financial Industry Regulatory Authority) is a government-authorized not-for-profit organisation that oversees US broker-dealers. FINRA's Advertising Regulation Department protects investors by ensuring that broker-dealers' communications are fair, balanced and not misleading and comply with the advertising rules of FINRA , the SEC, the MSRB and SIPC. Independent agencies require that some credit and financial product advertisements include certain logos or statements.

The Federal Deposit Insurance Corporation (the FDIC) requires an official advertising statement (12 C.F.R. § 328.3), such as 'Member of the Federal Deposit Insurance Corporation' and/or the FDIC logo be used on commercial messages. Banks advertising loans for homes through written and visual advertisements must include 'equal housing lender logotype' and/or explain that the bank provides the loans without regard to race, colour, religion, national origin, sex, handicap or familial status. 12 C.F.R. § 338.3 . The National Credit Union Administration requires its member credit unions to provide an official statement on their website and in advertising. 12 C.F.R. § 740.5 .

Lastly, the Federal Trade Commission, the executive agency responsible for enforcing the federal UDAP statute, provides business guidance to companies in the following industries: credit and loans, debt, debt collection, fintech and mortgages.

Law stated - 23 January 2023

Therapeutic goods and services

Are there special rules for claims made about therapeutic goods and services?

The Food and Drug Administration (FDA) regulates advertising for food, drugs and devices. Only FDA-approved drugs may be advertised; off-label use (use of drugs other than as approved by the FDA) may not be advertised. Any

advertisement must be fair and balanced, including a description of any risks or side-effects associated with the drug. Advertisements must include certain material facts and must be submitted to the FDA. Two well-controlled clinical studies are required to substantiate comparative claims. Advertisements for drugs and certain classes of devices must be pre-cleared by the FDA.

Print advertising is required to include a 'brief summary' relating to side-effects, contraindications and effectiveness similar to the FDA-approved label. Broadcast advertisements are required to include a 'major statement' that discloses the product's major risks in either the audio or audio and visual parts of the presentation. The broadcast advertisement must also include the 'brief summary' or 'adequate provision' of the approved or permitted package labelling. The FDA outlines ways to make an 'adequate provision' of the labelling information in its Consumer-Directed Broadcast Advertisements Guidance for Industry .

Law stated - 23 January 2023

Food and health

Are there special rules for claims about foodstuffs regarding health and nutrition, and weight control?

The FDA regulates food and beverage labelling (and advertisements that comprise 'labelling'), and the FTC regulates food and beverage advertising. The FTC gives deference to the FDA's definitions and regulations regarding health claims. Both the FDA and FTC can and will send warning letters relating to statements in advertising about health or weight control if they believe the statements violate the applicable regulations, are misleading or are unsubstantiated.

The FDA definition of a health claim includes an express or implied statement that characterise the relationship of any substance to a disease or health-related condition (21 CFR 101.14(a)(1)). Certain products are prohibited from making health claims (21 CFR 101.14(a)(4)). The FDA also regulates when nutrient content claims can be made, and under what circumstances. A nutrient content claim is an express or implied statement that characterises the level of a nutrient in the product (21 CFR 101.13(b)).

The FTC requires scientific studies to substantiate advertising claims related to health-related claims.

Law stated - 23 January 2023

Alcohol

What are the rules for advertising alcoholic beverages?

In March 2014, the FTC issued its report regarding Self-Regulation in the Alcohol Industry, which recommended the continued use of voluntary industry guidelines to reduce alcoholic beverage advertising and marketing to an underage audience. The guidelines are published by the Distilled Spirits Council of the United States , the Beer Institute and the Wine Institute . Under the voluntary self-regulatory codes, 71.6 per cent of the audience for each advertisement should consist of people 21 or older. Websites and social media that advertise alcohol are encouraged to be 'age gated' so that a consumer must enter a date of birth to show legal age. Models and actors in alcohol advertising should be at least 25 years old, substantiated by proper identification, and should appear to be over 21. State and local laws impose licensing requirements for producers, distributors and retailers of alcohol and additional restrictions on the advertising of alcohol including certain promotions and outdoor advertising.

Law stated - 23 January 2023

Tobacco

What are the rules for advertising tobacco products?

Answer in progress.

Law stated - 23 January 2023

Gambling

Are there special rules for advertising gambling?

The Communications Act of 1934 (18 USC section 1304) prohibited gambling advertising over broadcast media until the Supreme Court ruled it was unconstitutional under the First Amendment in 1999 (Greater New Orleans Broadcasting Assn v US, 527 US 173 (1999)). The Department of Justice noted in 2011 that advertising for illegal or online offshore gambling could be aiding and abetting prohibited gambling under the Wire Act (31 USC sections 5361–5367). The Federal Communications Commission permits in-state and out-of-state broadcast advertisements for lawful casino gambling. States have individual gambling advertising restrictions, and base their advertising regulations on what is legal within the state; for example, New York State allows broadcast advertising for physical casinos legal in the state, but not for online sports wagering when illegal. Many states also prohibit depicting those under 21 gambling, and require listing limiting factors and a gambling help hotline number (eg, Tennessee Sports Gaming Act HB00001 (2019)). The American Gaming Association , representing casinos in 44 states, assists members with compliance in the advertising of sports wagering in print and broadcast media.

Law stated - 23 January 2023

Lotteries

What are the rules for advertising lotteries?

Broadcast media advertising for lotteries must conform to the Federal Communications Commission's regulations . Federal law generally prohibits broadcast media advertising for or about lotteries unless the advertiser fully and accurately discloses rules and terms of the lottery; the lottery is conducted substantially as advertised; and falls under one of the following categories of exceptions:

- the advertisement is broadcasted for a station licensed in a state for that state's lottery;
- the advertisement is for legal Indian tribe gaming;
- the advertisement is for lawful casino gambling in any state;
- the advertisement is for not-for-profit fishing contests; or
- the advertisement is for a lottery authorised or not otherwise prohibited by the state the ad is broadcasting in, if they are conducted by a not-for-profit governmental organisation or a promotional activity by a commercial organisation when lotteries are not the primary business of that organisation.

Print advertisements of lotteries are permitted for legal gambling within the state, including mailed advertisements (8 USC section 1302; 3001; 3005).

Law stated - 23 January 2023

Promotional contests

What are the requirements for advertising and offering promotional contests?

Generally, 'promotional contests' are defined as an event where a participant can win a prize based on skill, differentiating them from lotteries, gambling or sweepstakes where chance determines prize award. The contest must be based on skill and not chance. Examples of contests include a half-court basketball shot, a crossword puzzle tournament or a magazine photography competition. The skill challenged must be a legitimate objective skill. Consideration can be required from an entrant for a contest and solicited through an advertisement, though states may restrict the amount or kind of consideration. The Federal Trade Commission and states generally require a clear and conspicuous disclosure in advertisements on terms, rules, prizes, length, sponsors and location of a contest (15 USC sections 41–58).

Sweepstakes are promotions in which participants have the chance to win a prize based on chance, including by random drawing. Purchase requirements or other forms of consideration are prohibited under state lottery and gambling laws. Sweepstakes involving prize values of more than US\$5,000 must be registered in New York and Florida.

Law stated - 23 January 2023

Indirect marketing

Are there any restrictions on indirect marketing, such as commercial sponsorship of programmes and product placement?

The Federal Trade Commission and the US Postal Service have authority to restrict and prosecute indirect marketing, promotions and advertising (15 USC section 41; 39 USC sections 3001). All individual states also have similar laws restricting deceptive advertising. A civil action can also be brought under the Lanham Act if a deceptive, indirect sponsorship harms a brand by causing confusion of the origin, sponsorship or association of a brand in an advertisement (15 USC section 1125).

Product placements are regulated on broadcast media by the FCC under Section 317 of the Communications Act of 1934. The Act allows 'embedded advertising', or production sponsorship, provided the audience of the broadcast is clearly disclosed regarding the paid sponsorship and sponsor at the time of the broadcast. The FCC requires broadcast television to include disclosures of product placements in television shows. The FTC does not require a disclosure of whether a product or brand appearing in the broadcast is sponsored unless there is an endorsement by a show host that is not 'obviously an advertisement'. The increased prevalence of social media influencers obtaining sponsorships and free products from brands has led the FTC to also clarify that clear disclosures outlining the influencers relationship to the brand on posts is required.

Law stated - 23 January 2023

Other advertising rules

Briefly give details of any other notable special advertising regimes.

The Federal Election Commission requires any public communication by a political committee or candidate on broadcast or print media to display a disclaimer – including an audible disclaimer by a candidate for broadcast advertisements authorised by the campaign.

Though First Amendment free speech considerations underly all advertising forms in the United States as commercial

speech (*Central Hudson Gas & Electric Co v Public Service Commission* , 447 US 557 (1980)), some jurisdictions have successfully enacted legislation that bars political, religious or advocacy advertisements on public property.

The United States allows promotion and advertising of new financial formats, such as non-fungible tokens (NFTs) and cryptocurrency, though many online platforms have private restrictions. It is predicted in some quarters that the Securities and Exchange Commission or another Executive Agency will issue more stringent guidelines regarding cryptocurrency and NFTs.

Law stated - 23 January 2023

SOCIAL MEDIA

Regulation

Are there any rules particular to your jurisdiction pertaining to the use of social media for advertising?

The development of social media channels like Facebook, Instagram, YouTube, TikTok and Clubhouse enables marketers to directly interact with consumers and engage with them in real time at a very low cost. While the rapid rise of social media platforms and the regular introduction of new platforms suggests an unregulated 'wild west', the Federal Trade Commission (FTC) and other regulators have made clear that the basic principles of advertising law apply to advertising in social media. Thus, just as with traditional advertising, all advertisers must have a reasonable basis to substantiate their claims and all material information must be clearly and conspicuously disclosed.

To satisfy legal requirements in social media advertising, marketers must grapple with unique challenges, including space and format constraints. Nevertheless, in the 2013 .com Disclosure Guides , the FTC made clear that such constraints do not excuse failure to clearly and conspicuously disclose material information. For example, advertisers may need to make audible disclosures and superimpose them on-screen to ensure that the required disclosures are made in videos on platforms such as Instagram, Facebook and YouTube.

When practical, the relevant information and qualifying information should be incorporated in the claim itself but, when a disclosure is required, the advertiser should consider factors such as the placement of the disclosure, its proximity to the relevant claim, its prominence, whether it is unavoidable, whether other parts of the ad distract from the disclosure and whether it is easily understandable to consumers. When using a hyperlink to lead to a disclosure, the link should be obvious, clearly labelled to convey the importance of the information and take the consumer directly to the disclosure on the click-through page, and the advertiser should monitor click-through rates to ensure that the hyperlink is effective. If scrolling is necessary, blank spaces should be avoided and visual or textual cues should be used to encourage consumers to scroll to view the disclaimer.

As the FTC states in its Native Advertising Guides , to prevent deception, it is important to ensure that all ads are clearly labelled as ads so that consumers do not misconstrue digital advertising to be independent editorial content. Similarly, disclosures are required when marketers solicit consumers and influencers to post about their products or brands by offering incentives such as sweepstakes entries, free products, discounts, payments or even the possibility of appearing in a commercial or ad. As stated in the FTC's Guides Concerning the Use of Endorsements and Testimonials in Advertising (Endorsement Guides – currently under scheduled review by the FTC) and the Frequently Asked Questions about the Endorsement Guides, the FTC has provided important guidance. An endorsement must be honest and non-misleading and reflect the honest experience of the endorser. Importantly, an endorsement cannot make claims that the advertiser itself cannot make. Finally, the endorsement must clearly and conspicuously disclose the material relationship between the brand and the endorser. According to the FTC, such disclosures and standards are required because consumers cannot distinguish between products that are recommended simply because the blogger believes in them and products that are recommended because the blogger was given the products for free or was paid to do so by the brand.

Have there been notable instances of advertisers being criticised for their use of social media?

The FTC, state attorneys general, and the advertising industry's self-regulatory body, the National Advertising Division of the BBB National Programs (NAD), have closely monitored advertising practices in social media. Since the 2009 release of the Endorsement Guides, the FTC has settled with dozens of marketers across the social media advertising ecosystem for violating section 5 of the Federal Trade Commission Act (FTC Act). Notable cases include the following:

- In 2016, the FTC approved a consent order with Machinima, a multiplatform online entertainment network, for misrepresenting in influencer campaigns that the influencers paid by Machinima to post on YouTube about video games were independent.
- In 2016, the FTC settled with retailer Lord & Taylor for posting an article that appeared to be objective in Nylon, an online publication, and a Nylon Instagram post without disclosing that the posts were paid promotions. Additionally, influencers that posted pictures of themselves wearing a dress from Lord & Taylor failed to disclose that they were paid to post about the dress.
- In 2015, the FTC settled with shipping company AmeriFreight for touting online reviews without disclosing that consumers were compensated to write the reviews.
- In 2017, the FTC settled with social media influencers TmarTn and Syndicate individually as well as in their roles as officers for CSGOLotto for failing to disclose their relationship with CSGOLotto and for failing to ensure that influencers talking about the gaming service were compensated.
- In 2019, the FTC settled with Sunday Riley and her eponymous cosmetics company for directing employees to post fake online reviews on the Sephora website.
- In 2019, the FTC settled with Devumi and its owner for selling fake followers on various social media platforms so that their buyers could exaggerate their social media influence to potential clients, investors, partners and employees.
- In 2020, the FTC settled with weight loss tea marketer Teami for burying disclosures of material connections between influencers and the brand on Instagram so that the disclosures were not visible unless the consumer clicked 'more'. Additionally, the FTC also sent warning letters to influencers for failing to clearly and conspicuously disclose that they were paid by Teami.

In October 2021, the FTC made clear that social media advertising continues to be a high priority. The Commission sent more than 700 letters to companies across the United States to put them on notice that they might face steep potential civil penalties under section 45(m)(1)(B) of the FTC Act if they make deceptive endorsements and testimonials.

In addition to the FTC, the NAD has prioritised social media advertising and frequently reviews social media advertising to determine whether the ads are legally compliant. To enhance its ability to quickly review social media advertisements, in 2020, the NAD launched the Fast-Track SWIFT challenge process to offer a streamlined review of common issues such as the prominence and sufficiency of disclosures in influencer marketing and native advertising. In 2021, the NAD added a new Fast-Track SWIFT Lane to focus on the prominence and sufficiency of disclosures in general. To further enhance its ability to remove misleading ads in social media, in 2021, the NAD partnered with Facebook to share case outcomes directly with Facebook so that Facebook enforcement teams could act on ads that violate the platform's truth in advertising rules.

Are there regulations governing privacy concerns when using social media?

Answer in progress.

Law stated - 23 January 2023

UPDATE AND TRENDS

Recent developments

Are there any emerging trends or hot topics in your jurisdiction?

The regulation of cryptocurrency and non-fungible token promotions is a frequently discussed topic given the exploding popularity and volatility of these asset classes.











Consumer class actions, particularly in the areas of foods, beverages and consumer products, are exploding in numbers. Any assessment of advertising risk must include an assessment of the risk of such litigation.

Social media communications and advertising practices remain under heavy scrutiny, with the FTC publicly pledging to bring enforcement against 'Big Tech' for unfair or deceptive practices.

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Law stated - 23 January 2023

Jurisdictions

	Hong Kong	Angus Forsyth & Co
	India	Anand and Anand
	Italy	Studio Legale Jacobacci & Associati
	Japan	Ikeda & Someya
	South Africa	Herbert Smith Freehills LLP
	Spain	Jacobacci Abril
	Sweden	Wistrand
	Switzerland	Walder Wyss Ltd
	United Kingdom	Herbert Smith Freehills LLP
	USA	Crowell & Moring LLP